Petition

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IN THE

Supreme Court of the United States

October Term, 1981

SALPETER, RICHARD D.,

Petitioner,

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Court of Appeals erred in holding that the compelled testimony of an immunized witness can be used by the government against that immunized witness in a grand jury proceeding which was convened to indict that witness, in a circumstance whereby the witness was ordered to make disclosures under a use immunity grant, pursuant to 18 United States Code, § 6002, inasmuch as the position taken by the Third Circuit squarely contradicts the long-standing positions of the Second and District of Columbia Circuits on this issue.

II. Whether the Court of Appeals erred in holding that it is permissible for prosecution investigators to draw information from tainted individuals, without first warning these tainted individuals not to reveal to the prosecution information which these tainted individuals had learned from having listened to the compelled immunized disclosures of the defendant, when the defendant had been ordered to make these disclosures under a use immunity grant pursuant to 18 United States Code § 6002.

III. Whether it was error for the District Court, affirmed by the Court of Appeals, to establish a new burden of proof, whereby a defendant is first required to identify how the government was tainted and how the tainted data may have aided the government, before the government can be required to come forward and prove that it was not tainted and that it has not used the tainted data, in a circumstance whereby the defendant had earlier been ordered to make disclosures under a use immunity grant, pursuant to 18 United States Code § 6002, inasmuch as this Court has set forth, in *Murphy v. Waterfront Commission of New York Harbor,* a burden of proof not here adhered to by the District Court.

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OPINION BELOW

There was no formal opinion of the court of appeals. Its Judgment Order affirming the district court has been reproduced in the appendix and has not yet been reported. The opinion of the district court has been reported at 502 F. Supp. 1071 (D. Del. 1980) and it too is reproduced in the appendix.

JURISDICTION

The Judgment Order of the court of appeals was entered on September 22, 1981. A petition for rehearing, timely filed, was denied on October 16, 1981. This Court's jurisdiction is invoked under 28 United States Code § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 United States Code § 6002 provides in pertinent part:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination to testify or provide other information in a proceeding before or ancillary to - - - (1) a court or grand jury of the United States, (2) an agency of the United States, or (3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House, and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

STATEMENT OF THE CASE

Involuntary bankruptcy proceedings were commenced against the defendant in August of 1977 following the financial collapse of his various businesses. (R 312a) [1] Pursuant to those proceedings, the defendant was compelled to testify following the conference of use immunity pursuant to 18 United States Code § 6002. (R 325a) The defendant thereafter rendered over seven hundred pages of compelled disclosures. (R 443a) As the amount of dollars involved was substantial and the creditors numerous, the sessions of compelled testimony, which were opened to the public, were attended by a large number of people. (R 268a) Many of the people who listened to the compelled immunized disclosures were later interviewed by F. B. I. agents and government attorneys. (R 239a-241a, 247a-249a, 445a, 473a, 229a-231a) At least four people who attended the sessions of compelled, immunized testimony were called by the government to testify before the grand jury convened to indict the defendant. The compelled, immunized testimony of the defendant covered the same transactions upon which the defendant's subsequent indictment under 18 U. S. C. § 1341 was based. (App. A11) The district court has found that two of the individuals who heard the defendant's immunized disclosures, revealed tainted information to the government and grand jury. (App. A10-A11) The district court also found that the source of the tainted information thus conveyed was the defendant's compelled, immunized disclosures. (App. A11) Several of the government attorneys and F. B. I. investigators who were involved with the investigation and trial of this matter,

1. Citations to "R" refer to the joint appendix filed for the appeal to the Court of Appeals for the Third Circuit. Defendant has requested that this appendix be certified as the record, pursuant to Rule 13.3 of the Supreme Court Rules—1980 Revisions.

either had untimely or inadequate knowledge, or both, of the fact that immunized testimony under a Section 6002 grant of immunity had been rendered by the defendant. (R 244a, 282a, 469a-470a, 192a)

At trial, the defendant offered testimonial and documentary evidence in support of his position that the key banks involved were aware of his activities. The bankers involved claimed to have had no such knowledge. Trial evidence showed that a contract of sale for a portion of the defendant's assets, if consummated, would have satisfied all or virtually all of defendant's overdrafts. The jury returned a verdict in favor of the government.

The trial judge denied petitioner's motions for a new trial and for dismissal of the indictment.

The court of appeals, by Judgment Order entered September 22, 1981, affirmed the trial judge without opinion.

Petitioner filed a petition for rehearing before the court of appeals in banc, which petition was denied by the court of appeals.

BASIS FOR FEDERAL JURISDICTION OF THE DISTRICT COURT

Jurisdiction of the district court in the first instance rests on the indictment of the defendant by a federal grand jury for alleged violations of 18 United States Code, § 1341.

REASONS FOR GRANTING THE WRIT

I.

It Is Impermissible for the Government to Use Before the Grand Jury, Evidence Which Has as Its Source the Compelled, Immunized Disclosures of the Target Defendant.

SUMMARY

By holding that it is permissible to use the direct and indirect fruits of compelled immunized testimony in a grand jury proceeding called to indict the immunized witness, the Third Circuit Court of Appeals has taken a position which is in direct opposition to the position which has been taken by the United States Supreme Court, the Second Circuit Court of Appeals and the Court of Appeals for the District of Columbia Circuit. The Third Circuit's position also contradicts the view of the Eighth Circuit Court of Appeals, although the Eighth Circuit has not confronted this issue quite as directly as have the Second and District of Columbia Circuit Courts. No other circuit or district court has taken a position which supports or agrees with the position here taken by the Third Circuit Court. If the position adopted by the Third Circuit is permitted to stand, a potential defendant who is granted immunity and thus compelled to testify, will testify knowing that it is permissible under the law for the government to then turn his own words against him by placing his compelled, self-incriminating disclosures, or their indirect fruits, before a grand jury convened to indict him. As a necessary consequence, rather than encouraging completely truthful and expansive disclosures, as was the intent of Congress in enacting Section 6002, the position advocated by the government will largely defeat the purpose of the immunity statute and thereby encourage half-truths, untruths and mental reservation. Finally, the position

taken by the Third Circuit does violence to the judicial concept of fundamental fairness.

I.

As a result of the collapse of the defendant's business interests, involuntary bankruptcy proceedings were initiated against him in August of 1977. (R 312a) The defendant was called to testify in those proceedings. Upon the invocation of the right against self-incrimination as guaranteed by the Fifth Amendment, a Federal Bankruptcy Judge ordered the defendant to testify and compelled him, under threat of contempt, to accept use immunity under Section 7(a)(10) of the Bankruptcy Act (11 U. S. C. § 344) and Title 18 United States Code § 6002. (R 325a) The trial court has found that information revealed by the defendant during the course of this compelled testimony was later placed before the grand jury which had been convened for the purpose of indicting the defendant. (R 506a)

The United States Supreme Court decisions most pertinent to the issues before this Court appear to commence with *Murphy v. Waterfront Commission of New York Harbor,* 378 U. S. 52 (1964) and *Kastigar v. United States,* 406 U. S. 441 (1972). In *Kastigar,* the Supreme Court wrote that:

> The Statute [Section 6002] provides a sweeping proscription of any use direct or indirect of the compelled testimony and any information derived therefrom. *Id.* at 460

And elsewhere:

> It [the immunity grant] prohibits the prosecutorial authorities from using the compelled testimony in *any* respect . . . *Id.* at 453 (Emphasis supplied by the Court)

The language of Section 6002 prohibits the use of the compelled testimony, or any information directly or indirectly derived from such testimony, "in any criminal case." It is defendant's contention that the statutory words "in any criminal case" prohibit the introduction of evidence to the grand jury, which evidence has as its source the compelled immunized disclosures of the defendant. Clear case law and statutory authority exists in support of this position.

The wording of Section 6002 which prohibits use "in any criminal case", parallels precisely the words of the Fifth Amendment: ". . . nor shall be compelled *in any criminal case* to be a witness against himself . . ." In construing these words "criminal case", as used in the Fifth Amendment, the Supreme Court wrote:

> The Fifth Amendment declares that 'No person . . . shall be compelled in any criminal case to be a witness against himself.' *An investigation by a grand jury is a criminal case.* (Emphasis added)
>
> *United States v. Monica,* 317 U. S. 427 (1943)

The Court in *Monica* followed the holding in *Counselman v. Hitchcok,* 42 U. S. 547 at 562 (1892). See to the same effect *Lefkowitz v. Turley,* 414 U. S. 70 at 77-78 (1973).

From this, the argument follows that the *Kastigar* and the Section 6002 prohibitions against "any use" of the compelled testimony precludes the introduction of evidence before the grand jury which is directly or indirectly traceable to the compelled disclosures. In the case *sub judice,* such tainted evidence was used before the grand jury. (R 506a) For this reason, and based upon the case law heretofore and hereafter cited, the grant of certiorari to review the judgment below is justified.

The Second Circuit Court of Appeals has dealt with this precise issue on several instances. In *United States*

v. Hinton, 543 F. 2d 1002 at 1009 (2nd Cir. 1976), the Court wrote:

> It is clear from these subsequent cases, however, that the fact that none of Hinton's immunized testimony was introduced at the trial does not resolve the question, for § 6002 speaks to *any* use of the immunized testimony against the witness in any criminal case, and so prohibits its use not merely at trial, but in the grand jury proceedings as well. (Emphasis by the Court)

This same issue was considered by the Second Circuit in *Goldberg v. United States*, 472 F. 2d 513 (2nd Cir. 1973). The defendant in *Goldberg* was also compelled to testify under an immunity grant pursuant to Section 6002. In holding that it was impermissible to place such compelled evidence before the grand jury, the Second Circuit wrote:

> Despite any instructions from the judge, it would be well nigh impossible for the grand jurors to put Goldberg's answers out of their mind, cf. *Bruton v. United States*, 391 U. S. 123 (1968), and testimony compelled by the order would thus 'be used against the witness in [a] criminal case.' cf. *Kirby v. Illinois*, 406 U. S. 682, 688-689, in defiance not only of 18 U. S. C. § 6002, but the command of *Kastigar* that the immunity must be 'coextensive with the scope of the privilege.' *Goldberg, supra* at 516.

The holding of the Third Circuit in the case at bar is in direct contravention of the Second Circuit's holding in *Goldberg*.

In analyzing the *Murphy* and *Kastigar* decisions the Second Circuit opined that:

> It places a significant burden firmly on the prosecution to demonstrate that an *indictment* is the product of legitimate rather than tainted evidence. *U. S. v. Kurzer,* 534 F. 2d 511 at 516 (2nd Cir. 1976) (Emphasis added)

The Court of Appeals, District of Columbia Circuit, is in agreement with the position of the Second Circuit on this issue and with the position which the defendant suggests to this Court as being the proper one. As a consequence, it is respectfully noted that the holding of the Third Circuit Court contradicts the reasoning of the District of Columbia Circuit as well. In speaking to the question here under review, the Court of Appeals for the District of Columbia Circuit wrote:

> Consideration of this appeal may be clarified by recognizing as precisely as we can the extent of the burden resting on the United States. We agree with the District Court's holding that '[o]nce immunity is shown the prosecutor has the burden of demonstrating that its use of the immunized testimony *has not tainted any aspect of the case up to the indictment* and will not do so during the trial.' *United States v. DeDiego,* 511 F. 2d 818 at 821 (D. C. Cir. 1975) (Emphasis added)

Likewise, the opinion in *United States v. McDaniel,* 782 F. 2d 305 at 311 (8th Cir. 1973) strongly suggests that the Eighth Circuit would also agree that it is impermissible to directly or indirectly use compelled immunized testimony before the grand jury. The district court for the Eastern District of Illinois agrees as well, that grand jury use of immunized testimony is not permissible. In *United States v. Rice,* 421 F. Supp. 871, 876, 877 (E. D. Ill. 1976), the district court noted in a searching opinion that there must be a showing, in a Section 6002 immunity

case, that the evidence used before the grand jury "was obtained from an independent source." *Id.* at 877.

It is clear that unless protection is offered, a defendant cannot be called before a grand jury and be compelled to provide self-incriminating information. By its holding, the Third Circuit Court of Appeals makes it acceptable for the government, in effect, to do just that. As a consequence, the Third Circuit's position will allow the government to do indirectly that which the government concededly could not do directly. To permit the government to use, before the grand jury, information previously disclosed by a target defendant under compulsion and immunity, is to invite perversion of the judicial process. The position here taken by the Third Circuit will force an immunized witness either to perjure himself, to accept a jail sentence for contempt, or to provide information which can then be placed before the grand jury convened to indict him. Even if it could be argued that such does not contravene some principle of our laws, it is axiomatic that to place a witness in such an unconsionable position would do violence to the judicial concept of fundamental fairness. *New Jersey v. Sugar*, 84 New Jersey 1, 417 A. 2d 474 at 481 (1980).

Finally, as a consequence of the position adopted by the Third Circuit on this issue, there will exist strong motivation for a potential defendant to be less than truthful while testifying under immunity. In point of fact, it appears upon closer analysis, that if left undisturbed, the Third Circuit's view on this issue will be counterproductive to society's and the government's long range law enforcement interests in encouraging full and complete disclosures by means of a grant of immunity. Presumably, this defendant can be reindicted using untainted evidence, and subsequently, retired. However, it is submitted with the utmost respect, that the negative repercussions of the

Third Circuit's landmark holding on this issue will not be so easily rectified.

Since permitting use of a witness' compelled immunized testimony before the grand jury convened to indict the immunized witness, is contrary to the specific wording of the Statute, the Supreme Court cases interpret this statute and the protection required by the Fifth Amendment, the grant of certiorari to review the judgment below is legally appropriate. Furthermore, the grant of certiorari is necessary to prevent a genuine miscarriage of justice, both in this case and in future similar cases. Finally, the grant of certiorari is necessary to cure a split in the circuits on this fundamental issue.

II.

The Trial Court, Affirmed by the Court of Appeals, Erred in Failing to Hold That the Government Violated the Principles Set Forth in *Miranda v. Arizona*, by the Government's Failure to Provide Adequate Procedural Safeguards to Secure the Constitutional Privilege Against Self-Incrimination

Throughout the course of the government's investigation and preparation of this case, the various government individuals involved undertook virtually no steps to afford appropriate safeguards to insure that the information they garnered was not directly or indirectly derived from the compelled testimony of the defendant. As a result of this failure, data derived from the defendant's compelled self-incriminating disclosures reached the government and was used against him. (R 506a) Under the facts of this case, the failure to effectively provide such procedural safeguards is violative of an individual's Fifth Amendment privilege against self-incrimination.

The simplest means to provide an understanding of the problem which exists here is by way of analogy to a

prospective defendant who is being subjected to a custodial interrogation by law enforcement officials. In such an instance, since the citizen himself is present, he has some ability to prevent the uttering of self-incriminatory statements. Nevertheless, the Supreme Court has perceived the practical realities of those circumstances. As a consequence, even though the citizen is obviously present to protect his own interests, the Supreme Court has required that certain procedural safeguards must be employed by law enforcement officials "to secure the privilege against self-incrimination." *Miranda v. Arizona,* 384 U. S. 436 at 444 (1965).

A citizen, such as the defendant here, who is compelled to make self-incriminating disclosures under a grant of "immunity", is truly in greater jeopardy of losing the protection of his Constitutional right against self-incrimination than is a citizen who is subjected to custodial interrogation. The violation here, to be sure, is considerably more subtle.

A brief examination of the conduct of the prosecution related individuals who were assigned to investigate and prosecute the defendant is necessary in order to focus the plight and the practical realities of a citizen who is compelled to make self-incriminatory revelations under a grant of use immunity.

Christian Hoyer was the Assistant U. S. Attorney in Tampa, Florida who was originally responsible for the conduct of the investigation into the alleged check kiting activity of the defendant. Alan Peregoy was employed by the Internal Revenue Service and he too was stationed in Tampa. Mr. Peregoy was assigned to the defendant's case as well, being responsible for the tax implications of the defendant's bankruptcy. In this capacity, Mr. Peregoy attended the bankruptcy hearings wherein the defendant made his compelled, immunized disclosures. During the course of the post-trial taint hearing held by the trial court,

the Assistant U. S. Attorney admitted to having had between two and ten conversations "relative to the Salpeter matter" with the tainted IRS Agent. (R. 229a-231a) The IRS agent had attended Mr. Salpeter's compelled testimony. (R 266a-267a) The Assistant U. S. Attorney admitted that he never instructed the IRS agent not to speak to him relative to the matters that the defendant had discussed in his compelled testimony. (R 231a) Of further concern is the fact that the Assistant U. S. Attorney testified that he was never aware that the IRS agent had attended the compelled testimony. (R 231a) Finally, the Assistant U. S. Attorney conceded that since he did not attend the sessions of compelled testimony, he would have no way of knowing whether an individual was relating to him information derived directly or indirectly from the immunized revelations. (R 234a)

The government did not call the IRS agent to testify in the taint hearing. Aside from the fact that such is a patent breach of the government's burden of proof under the *Murphy* rule, even had the IRS agent been presented, the defendant would have been faced with the problem of an adversary with a memory dulled by the passage of some two years. Under such a circumstance, a taint hearing provides little or no procedural safeguard "to secure the privilege against self-incrimination." *Miranda, supra,* at P. 444. Effective warnings from the Assistant U. S. Attorney to the IRS agent would have allowed the witness who had been compelled to testify, to be protected by the conscience and honor of two separate individuals. The conversations between the tainted IRS agent and the prosecutor left the defendant naked of any meaningful protection.

A second example of the woefully inadequate Fifth Amendment "protection" afforded this defendant can be found by examining briefly, the conduct of the two FBI

agents who were assigned to gather evidence against the defendant. In August of 1977, Ronald H. Jordan, an F. B. I. agent from Tampa, Florida was assigned the task of investigating the defendant's activities. (R 236a) Agent Jordan admitted that he had no knowledge whatsoever that the defendant had rendered compelled testimony until but a few weeks before the March, 1980 start of trial. (R 244a) Consequently, as to this F. B. I. agent's investigative activity, subsequent to the defendant's first compelled testimony in January of 1978, the agent had no notion that there were subjects which should not be discussed, documents which should not be secured and individuals who had been influenced by access to the compelled testimony. (R 246a) The agent admitted to numerous conversations with officers of the various banks who had instituted the bankruptcy proceedings, which conversations took place subsequent to the defendant's immunized testimony. (R 239a-241a, 247a-249a) Naturally, the agent admitted that he did not first caution any of these men to refrain from discussing with him anything which they may have learned as a direct or indirect result of their attendance at the compelled disclosures of the defendant. (R 246a)

Special Agent Donald P. Atkins of the Federal Bureau of Investigation, Delaware District, was assigned to investigate the Salpeter matter in 1977 and remained on the case apparently through trial. (R 278a) He admitted that the first time he became *aware* of the existence of immunized Salpeter testimony was in November of 1979, which was almost two years after the immunized testimony was rendered. (R 282a) The investigation was presumably complete and the indictment was handed down on November 6, 1979. Agent Atkins testified that neither Assistant U. S. Attorney John McDonald (District of Delaware), nor anyone else, had ever instructed

him to be careful to avoid securing information which may have been tainted by virtue of the fact that it had been derived, directly or indirectly, from the defendant's compelled, immunized testimony. (R 282a) Likewise, during this agent's review of potential witnesses and documents, and in any conversations which he may have had about the case, the agent admitted that the concept of avoiding immunized or tainted material simply was not in his mind.

A citizen is compelled to testify and he is told by his government that his constitutional rights afforded by the Fifth Amendment will be effectively preserved and protected. That same government sends out two F. B. I. investigators to work to gather evidence against the citizen, but neglects to inform the agents of the immunity grant. As a consequence, as they go about interviewing witnesses and gathering documents, the only protection afforded the citizen who has been stripped of his right to remain silent is that which is offered by good fortune and chance. Although the citizen doesn't realize it, he has been left only with the blind hope that the F. B. I. will not talk to people who listened to the compelled testimony. Our Constitution requires more substantive protection than that afforded by blind hope.

A third and perhaps the most egregious example of how an immunized witness' Fifth Amendment privilege can be defiled under this and similar cases, can be found in the context of the activities of John McDonald, the Assistant U. S. Attorney for the District of Delaware who was first put in charge of this case in Delaware. Mr. McDonald was assigned to this case in August of 1977. He did not learn that compelled, immunized disclosures had been made by the defendant, until one year later, i.e., August of 1978. (R 151a-152a) In or about August of 1978, the matter was transferred from Tampa to the Dela-

ware district for prosecution and Mr. McDonald then became more actively involved. (R 151a-152a) In this connection, this Assistant U. S. Attorney interrogated Mr. Frank Uleau before the grand jury in September of 1978. (R 144a) Mr. Uleau attended the January and March, 1978 sessions of the defendant's compelled, immunized revelations. (R 469a-470a) After hearing the defendant's immunized testimony, Mr. Uuleau talked with the government, both privately and before the grand jury, about many of the exact same topics on which the defendant had earlier been compelled to make revelations in his immunized bankruptcy testimony. (R 445a to 472a) Included in the appendix to this Petition is a list of some thirteen areas of similarity between the compelled testimony of the defendant and the grand jury testimony of Mr. Uleau. (App. A24-A26) What is particularly disturbing about the actions of the Assistant U. S. Attorney is that Mr. Uleau, during the course of his grand jury testimony, *informed* and thereby alerted the Assistant U. S. Attorney to the fact that an answer Mr. Uleau had just provided to the grand jury had come from Mr. Salpeter's compelled, immunized testimony. The Assistant U. S. Attorney had asked Mr. Uleau a lengthy question. In reply, Mr. Uleau said:

> MR. ULEAU: I didn't know at the time. *I learned that after the fact.*
>
> ASSISTANT U. S. ATTY. MR. MCDONALD: From whom did you learn it?
>
> MR. ULEAU: Also, *I attended, in fact, I attended several of the Chapter 11 hearings,* if you will. (A portion omitted)
>
> ASSISTANT U. S. ATTY. MR. MCDONALD: Well, I don't want to get into the Chapter 11 thing.

MR. ULEAU: Well, *it was testimony that Salpeter had made.* (R 469a-470a)

Consequently, the Assistant U. S. Attorney had actual knowledge:

(a) That the defendant had been granted immunity and had made compelled revelations; (R 145a)

(b) That this grand jury witness had listened to that testimony, and; (R 469a-470a)

(c) That Mr. Uleau was *in fact* providing information to the grand jury the source of which was the compelled testimony. (R 470a)

Most disturbingly, the Assistant U. S. Attorney made scant effort to force Mr. Uleau to separate and keep confidential that which he learned during the course of his attendance at the compelled testimony. In its post trial Opinion, the trial court understandably found that this Assistant U. S. Attorney had not taken precautions to focus Mr. Uleau's attention on the importance of avoiding the communication of information learned from the compelled testimony.[2] Had "procedural safeguards" been employed and had Mr. Ulea been given an informative and effective warning at the outset of this interrogation, the above noted thirteen areas of tainted data conveyed by Mr. Uleau's grand jury testimony in all probability would not have passed to the government and the grand jury.

2. The questioning by the [government] attorneys did, however, cover subject matter also covered in the Salpeter bankruptcy testimony and special precautions were not taken, at least at the time of the Uleau interview, to focus attention on the importance of avoiding communication of information from the compelled testimony. (R 506a)

The contact between Mr. Uleau and Mr. McDonald brings into sharp focus another significant problem of a defendant in these circumstances. Effective warnings would help to alleviate the disadvantage to which the defendant is put in attempting to expose the fact that the government has received tainted information. For, even though a thorough cross-examination of government counsel occurred during the taint hearings, materially inaccurate answers by the government attorneys to questions posed by the defense, completely obscured the fact that tainted data had passed to the government.

The Supreme Court in *Murphy*, as reaffirmed in *Kastigar*, imposed an affirmative duty on the prosecution "to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." *Kastigar, supra*, at 460. In attempting to satisfy this affirmative duty, the government called Assistant U. S. Attorney McDonald to testify in the pre-trial taint hearings held by the trial court. On cross examination, the defense asked Assistant U. S. Attorney McDonald:

> MR. OWENS: [McDonald, while you were questioning Mr. Uleau before the grand jury] were you aware that he had attended certain of the bankruptcy testimony of Mr. Salpeter?
>
> MR. MCDONALD: No.

In view of the foregoing excerpts from Mr. Uleau's grand jury testimony, it is apparent that this answer was wrong and that the Assistant U. S. Attorney had been made aware of that very fact by Mr. Uleau.

During this same pre-trial taint hearing, Mr. McDonald had earlier testified that the grand jury testimony of Mr. Uleau did not touch upon that which had been covered in the compelled testimony of the defendant. A lengthy question was posed by the defense to show that

the Assistant U. S. Attorney could not have known whether matters relating to the compelled testimony were communicated by Mr. Uleau to the grand jury and government. Mr. McDonald's reply follows:

> MR. MCDONALD: Because the questions to which Mr. Uleau responded in the course of the interview . . . were in the frame of reference in which he responded to them, were matters which related to what Mr. Uleau did and what Mr. Uleau saw during the period of January through August of 1977. The scope of the inquiry did not exceed those dates. *Mr. Uleau further did not relate that he had obtained this information at any other time.*
>
> MR. OWENS: I beg your pardon? What was that last thing you said?
>
> MR. MCDONALD: *That he had received the information which he related to me at some time other the period January through August.*
>
> MR. OWENS: Did you specifically ask him that in his Grand Jury testimony?
>
> MR. MCDONALD: No. But it is in the context of the answers. (R 158a-159a)

Once again, in view of the excerpts of Mr. Uleau's testimony quoted above at pp. 15-16, the Assistant U. S. Attorney's answer was materially inaccurate. Mr. Uleau not only stated that he had learned the pertinent information after the fact, but Mr. Uleau also advised that the defendant himself had so testified, such occurring while the defendant was under immunity.

Finally, Assistant U. S. Attorney McDonald was questioned on direct examination in this taint hearing by another Assistant U. S. Attorney:

ASSISTANT U. S. ATTORNEY: When you conducted the limited interviews that you did conduct with individuals, not bank attorneys, relative to the investigation of Mr. Salpeter, *did you discuss the subject of Mr. Salpeter's immunized testimony in any bankruptcy proceeding?*

MR. MCDONALD: *Oh no, never.*

ASSISTANT U. S. ATTORNEY: *Did the subject ever come up,* not at your introduction into the conversation, but as a result of matters which may have been stated by the individuals you were questioning?

MR. MCDONALD: *The subject of the bankruptcy proceeding never arose.* (R 149a)

Once again, the Assistant U. S. Attorney's answer is materially inaccurate in view of Mr. Uleau's statement to the same Assistant U. S. Attorney that he had attended the compelled testimony and that "it was testimony that Salpeter had made." (R 470a)

The egregious errors of Assistant U. S. Attorney McDonald's memory are recounted for the purpose of highlighting how useless the taint hearing often is. As a sole remedy, a taint hearing is an inadequate procedural safeguard. Here the defense was fortunate to know of the existence of, and be able to later secure a copy of a written document (Uleau's grand jury transcript) to which it could turn several months later for verification absolute. Had the defense been forced to rely on the recollection of this Assistant U. S. Attorney or the recollection of an F. B. I. investigator, the effort to prove that taint had reached the government would have been futile. It represents the realities to suggest that had not a document existed to contradict the Assistant U. S. Attorney's recollection and to prove government and grand jury taint, in all probability the trial court would have given credence

to the testimony of the Assistant U. S. Attorney that no tainted information had passed from Mr. Uleau to the government and grand jury.

The point is, however, that while the opportunity for a defendant to have a taint hearing is welcomed and essential, at best, a hearing can only hope to possibly uncover and perhaps cure a disease. "Procedural safeguards" in the form of preinterrogation warnings would help to prevent the disease from occurring in the first instance. A citizen of this country is entitled to no less. The Fifth Amendment and this Court's holding in *Miranda* mandate effective protection of one compelled to make self-incriminating disclosures.

A look to the facts of this case provides an insight into the practical realities which prevail when an individual is granted use immunity and compelled to make self-incriminating disclosures under Section 6002.

(1) An individual is granted immunity and forced to make extensive self-incriminatory disclosures. (R 31a-32a)

(2) Following the witness' testimony, at least one newspaper article quoting his compelled testimony is published. (R 495a)

(3) The F. B. I. agent and the Assistant U. S. Attorney assigned to investigate the witness' activities make a practice of reading newspaper articles about the witness. (R 249a-250a, 223a)

(4) The compelled testimony is opened to the public, is listened to by officials of various banks, their counsel, government agents, creditors, consultants, agents of those seeking to purchase the witness' assets and the court room is in fact "packed". (R 266a-268a)

(5) Subsequent to the compelled immunized testimony, government agents and attorneys assigned

to investigate and prosecute the immunized witness actually interview, draw information from and have other repeated contact with those who in fact attended and listened to the compelled, self-incriminating disclosures. (R 239a-241a, 247a-249a, 445a, 473a, 229a-231a)

In the case law leading up to and following *Miranda*, there are frequent examples of clever techniques of interrogation, be they psychological pressure or semantic trickery. However, under the circumstances just recited, there is no need for such sleight-of-the-hand. For example, when an F. B. I. agent or prosecution attorney interviews an official of a bank which incurred a loss and who attended the compelled testimony, in point of fact there are two people present who are eager to do whatever is possible to expedite and enhance the progress of a criminal investigation of the potential defendant. As opposed to a custodial interrogation, the immunized witness is not even present to prevent the flow of self-incriminating information to the government. The banker who sat and listened to the compelled self-incriminating testimony is free to and in all probability will reveal, knowingly or unknowingly, information he received directly from the defendant's mouth. The trial court has found that such is precisely what has occurred in the case at bar. (App. A10-A11) It is defendant's contention that under these circumstances there exists a significant need for some type of "procedural safeguards". For example, perhaps the F. B. I. agent or Assistant U. S. Attorney should be required to warn prospective interviewees:

(1) That a witness has been granted immunity and the import of this grant;

(2) That if the interviewee has had any direct or indirect exposure to the immunized testimony of

that witness, the interviewee must not reveal to the government that which he has learned thereform;

(3) That if the interviewee feels unable to separate and keep confidential that which he learned from the compelled testimony, he must make such fact known to the interviewer before speaking further to the interviewer.

These "warnings" are posed by way of example. It is not presumed that these warnings are the best, nor that this method of securing protection for the defendant's Fifth Amendment rights is the most appropriate. However, the underlying point of *Miranda* appears clear—i.e. that if the privilege against self-incrimination is to mean anything, then under a Section 6002 grant of immunity, there must be effective means "to secure the privilege against self-incrimination." *Miranda, supra,* at P. 444.

As we now review the course of events which transpired in dealing with the withdrawal of this defendant's Fifth Amendment privilege, it is clear that rights declared in words have indeed been lost in reality. *Weems v. United States,* 217 U. S. 349, 373 (1910). The *Miranda* Court noted that the Fifth Amendment privilege is so fundamental to our system of constitutional rule and that the expedient of giving an adequate warning is such a simple way to protect that privilege.

Once the immunized witness' plight is understood, it is self-evident from a constitutional standpoint, that the need of a Salpeter-type defendant for the procedural safeguarding of his Fifth Amendment rights is even greater than the need of a *Miranda*-type defendant. As a consequence of the government's failure to adequately safeguard the defendant's Fifth Amendment privilege as required by *Miranda*, the grant of certiorari to review the judgment below is justified.

III.

It Was Error for the Trial Court, as Affirmed by the Court of Appeals, to Shift to the Defendant the Burden of Identifying Tainted Evidence and to Require the Defendant to Articulate a Theory as to How That Evidence Aided the Government

If a defendant believes that a portion of his compelled, immunized disclosures have found their way to the government, the Supreme Court in *Murphy* defined how such a problem is to be handled. The Supreme Court in *Kastigar* reaffirmed the rule of *Murphy.*

> One . . . need only show that he testified under a grant of immunity in order to shift to the government the *heavy burden* of proving that all the evidence it proposes to use was derived from legitimate sources. (Emphasis by the Supreme Court) *Kastigar, supra,* at 460.

The defendant has shown that he testified under a grant of immunity. (R 325a) However, in its holding, the trial court added new and formidable duties to the Supreme Court's statement of the defendant's burden. Furthermore, the trial court affirmed by the court of appeals, materially altered the rule of *Murphy* as to the time and conditions under which the burden of proof shifts to the government. The trial court found that:

> it is not unreasonable to require the defense to *identify* some part of that evidence and *articulate* some theory as to how it could conceivably have been of aid to the government before calling upon the government to *prove* that it had no access to that compelled evidence, that the information was valueless, or that it had an independent source. (Emphasis by the trial court) (R 514a)

One of the theories which provides the justification for forcing a citizen to give witness against himself is that the compulsion to testify must leave both the citizen and the government in the same position each would have been in had the individual not been compelled to make self-incriminating disclosures. The protection afforded the immunized witness must be "coextensive" with the privilege. *Kastigar*, at 460. The trial court's imposition of these new and considerable duties upon the immunized witness is violative of the basic requirement of "coextensiveness" which must be present for an immunity statute to pass constitutional muster. The trial court's requirement that the defense must "identify some part of the evidence" and "articulate some theory as to how it could conceivably have been of aid" before the vesting of the government's responsibility to prove the absence of use, plainly contradicts the unequivocal burden on the government enunciated in *Murphy* and reaffirmed in *Kastigar*.

The trial court, as affirmed by the court of appeals, not only lacked legal precedent for its novel approach, having failed to cite case law in support for its new requirements, but also, this departure directly contradicts the plain language of the Supreme Court's *Murphy* and *Kastigar* decisions. This contravention of the decisions of the United States Supreme Court strongly suggests that the grant of certiorari to review the judgment below is justified.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the court of appeals in the instant case.

Respectfully submitted,

PETER W. BROWN
JOHN T. OWENS
JOHN T. OWENS, P. A.
Attorneys for Petitioner

Appendix

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 80-2686 and 81-1265

UNITED STATES OF AMERICA

v.

SALPETER, RICHARD D.,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE
(D.C. CRIM. NO. 79-00888)

Argued

September 22, 1981

Before: ALDISERT, HIGGINBOTHAM, and SLOVITER,
Circuit Judges.

JUDGMENT ORDER

After considering the contentions raised by appellant, to-wit, that (1) if the evidence is presented to an indicting grand jury, the source of which is immunized testimony of the indicted defendant who was compelled to so testify the indictment is violative of the provisions of 18 U.S.C. § 6002, the fifth amendment and pertinent case law; that (2) It was error for the trial court to shift to the defendant the

burden of identifying tainted evidence and to require the defendant to articulate a theory as to how that evidence aided the government; that (3) in view of the compelled testimony, the government failed in its obligation under the fifth amendment to provide effective procedural safeguards to secure the defendant's privilege against self incrimination; and (4) the various exceptions taken by the appellant to the opinion of the trial court; and for the reasons given by the Honorable Walter K. Stapleton, district judge, in *United States v. Salpeter*, 502 F. Supp. 1071 (D. Del. 1980); it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

By THE COURT,

/s/ ALDISERT
Circuit Judge

Attest:

/s/ SALLY MRVOS
Sally Mrvos, Clerk

DATED: SEP 22 191

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Criminal Action No. 79-88

UNITED STATES OF AMERICA,
Plaintiff,

v.

RICHARD D. SALPETER,
Defendant.

James W. Garvin, Jr., Esquire, United States Attorney, William C. Carpenter, Jr., Esquire, Assistant United States Attorney, Peggy L. Ableman, Esquire, Assistant United States Attorney, Wilmington, Delaware, Attorneys for Plaintiff

John T. Owens, Esquire, Walsh, Monzack & Owens, Wilmington, Delaware, Attorney for Defendant

OPINION

Wilmington, Delaware
November 5, 1980
STAPLETON, *District Judge:*

I. THE SELF-INCRIMINATION ISSUE.

The principal issue remaining in this case is whether the conviction of the defendant, Richard Salpeter, on seventeen counts of mail fraud in violation of 18 U.S.C. § 1341,* was obtained in violation of his Fifth Amendment

* 18 U.S.C. § 1341 provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, repre-

right against self-incrimination. Resolution of this issue depends upon whether the government was aided in obtaining that conviction by immunized and compelled testimony previously given by Mr. Salpeter in a bankruptcy proceeding.

In 1977, banks in Florida, Pennsylvania, and Delaware suffered losses totalling more than two million dollars from a check kiting scheme conducted by Mr. Salpeter. The scheme utilized the checking accounts of numerous companies which he controlled and operated. Immediately following the discovery of the kite in late July, 1977, the Federal Bureau of Investigation ("FBI") began to investigate the defendant's alleged criminal conduct in both the Middle District of Florida and in the District of Delaware. During August and the early Fall of 1977, interviews were conducted of bank officials and employees of the defendant who had kept his accounts or managed his companies. Based on these interviews and the relevant banking records the operation of the scheme was charted by FBI agents during the Fall of 1977 for use in the anticipated prosecution.*

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* (Cont'd.)

sentations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

* Suppression Hearings (hereinafter "Tr."), Vol. E, p. 74.

Although the United States Attorney's Office in Delaware was aware of the pending investigation and the potential charges which could result therefrom, the case was assigned initially to the United States Attorney in the Middle District of Florida for prosecution in Tampa. Specifically, the case was assigned in that office to Assistant United States Attorney W. Christian Hoyer. It was not until early Fall, 1978, after the bulk of the FBI investigation had been completed, that primary responsibility for the prosecution was assumed by the Office of the United States Attorney for the District of Delaware.

Prior to the transfer of responsibility for prosecution to Delaware, those banks which had suffered losses in the course of the kite scheme initiated involuntary bankruptcy proceedings against the defendant. These proceedings were conducted before a Federal Bankruptcy Judge in the Middle District of Florida at Tampa. When called upon to testify in those proceedings Mr. Salpeter asserted his right against self-incrimination guaranteed by the Fifth Amendment. The court granted him use immunity under Section 7a(10) of the Bankruptcy Act and Title 18, United States Code, Sections 6001, *et seq.* and ordered him to respond to the interrogation. Mr. Salpeter thereafter testified on January 25, 1978, March 9, 1978, September 11, 1978 and November 15 and 16, 1978.

The transcripts of the bankruptcy proceedings were sealed by Order of the Bankruptcy Judge, and neither the Department of Justice, nor the Offices of the United States Attorney for the Middle District of Florida or Delaware were involved in the proceedings in any way. Furthermore, the prosecution asserts that none of its agents or attorneys attended the proceedings or read the transcripts * and I fully credit this testimony.

---

* There was testimony by a Mr. Friedman, an attorney for one of the banks, that Mr. Christian Hoyer, an Assistant United States Attorney for the Middle District of Florida, was present at

On November 6, 1979, a Federal Grand Jury in Delaware returned an indictment charging the defendant with seventeen counts of mail fraud in connection with the check kiting scheme. After the filing of the indictment, this Court conducted a pretrial hearing to determine whether the government had made any use, direct or indirect, of the compelled testimony in its investigation and prosecution of this case. During the course of that hearing the government produced for examination every witness which it intended to call to testify during its case-in-chief. This included each witness ultimately called by the government at trial. During cross-examination of these government witnesses at the pre-trial hearing, defense counsel complained that he could not interrogate effectively without referring to the content of the immunized testimony and thereby "contaminating" the two members of the United States Attorney's Office who were then prosecuting the case against Salpeter. With the Court's acquiescence, defense counsel reserved his right to further question certain witnesses after trial and to pro-

* (Cont'd.)

one of the sessions of Salpeter's immunized testimony Tr. Vol. F, pp. 40-41. Mr. Hoyer has testified that he did not attend any of the bankruptcy hearings and I credit his testimony. *See* Tr. Vol. E, p. 35.

Additionally, the defense has noted the presence at the bankruptcy hearings of a Mr. Alan Peregoy, an Internal Revenue Service agent, and Mr. Hoyer's testimony that he spoke with Peregoy in the Federal Building during the course of the bankruptcy proceedings. I am satisfied on the basis of Hoyer's testimony, however, that he had no substantive conversation with Peregoy "about the testimony of Mr. Salpeter at the bankruptcy proceedings." Tr. Vol. E, pp. 36, 56-57.

Finally, it should be noted that Peregoy played no role in the investigation that led to this prosecution and did not communicate in any way with the attorneys who prosecuted this case for the government.

duce additional evidence at that time in the event of a conviction. Following the pre-trial hearing, I entered an order denying defendant's motion to suppress the testimony of the witnesses called by the government, with the provision that the motion would be reconsidered "after trial on the basis of the trial testimony and any evidence tendered at the pretrial hearing on taint from the defendant's immunized bankruptcy testimony."

At trial, the government introduced evidence tending to show that Salpeter had conceived, and had executed through his controller, Leroy Williams, and other subordinant employees, a check kite scheme to defraud the banks of money and credit. The government also showed that each of the seventeen mailings of bank deposits referred to in the seventeen counts of the indictment were made in furtherance of the scheme. Williams, testifying under a grant of immunity, told the jury about the details of the origination and execution of the scheme, including Salpeter's instructions to him, how the kite grew larger and more complex, and where the proceeds of the kite went. He related that the kite had ultimately been computerized and that he had supplied the government with a computer printout laying out the entire operation of the kite. Other Salpeter employees who had participated in the kite corroborated Williams' testimony.

The defendant took the stand and acknowledged his role as the originator of the "check writing plan" described by Williams and conceded that the mailings had been a crucial part of that plan. Nor was there any dispute about his profiting from the operation of the plan. The sole issue for the jury was whether Salpeter had had an intent to defraud. He claimed he had not had such an intent because he knew that the bank officials with whom he dealt were aware of his "check writing plan" and he believed that they approved it as a means of ex-

tending credit to him. The bank officials denied that they had intended to extend credit in this manner and the government introduced other evidence tending to show that some of the banks had denied more orthodox extensions of credit to Salpeter shortly before and during the kite. The defendant was convicted on April 3, 1980 on all seventeen counts.

Shortly after the jury's verdict, a post-trial hearing was held to continue the questioning of those witnesses whose cross-examination during the pre-trial hearing had been limited. Currently before the Court is the defendant's motion to overturn his conviction on the grounds that the government has failed to establish that it did not use information disclosed in Salpeter's immunized testimony in violation of the defendant's Fifth Amendment right against self-incrimination.

In support of his motion, defendant relies primarily on the Supreme Court's decision in *Kastigar v. United States*, 406 U.S. 441 (1972). In *Kastigar*, the Court faced the question whether the immunity provided by 18 U.S.C. § 6002 * was constitutionally sufficient to compel testimony over a claim of the Fifth Amendment privilege against self-incrimination. In holding that the statutory immunity was coextensive with the protection provided by the privilege the Court noted that:

> . . . The statute provides a sweeping proscription of any use, direct or indirect, of the compelled testimony and any information derived therefrom:
>
> "[N]o testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other

* This is the same statutory immunity under which Mr. Salpeter testified.

> information) may be used against the witness in any criminal case. . . . 18 U.S.C. § 6002.
>
> This total prohibition on use provides a comprehensive safeguard, barring the use of compelled testimony as an "investigatory lead," and also barring the use of any evidence obtained by focusing investigation on a witness as a result of his compelling disclosures.

406 U.S. at 460.

The Court also held that once it had been established that the defendant testified under this statutory immunity, the government faced the "heavy burden" of proving that all the evidence it proposes to use was derived from legitimate independent sources. 406 U. S. at 460-41. The governmental burden of establishing an independent source for all its evidence stems from the Court's recognition that only such a requirement ensures that statutory immunity will be coextensive with the privilege against self-incrimination.

In this case there is no question but that the government carried the *Kastigar* burden of showing that its evidence was derived from a "legitimate, independent source". The suppression hearing and trial evidence established beyond any doubt that each government witness to whom the jury was exposed was known to the government as a potential witness prior to the compelled testimony and testified on the basis of his or her personal knowledge of the check kiting scheme gained while it was in progress. Similarly, it has been shown that each document placed before the jury was a product of the government's investigation of the bank records and not of the compelled bankruptcy testimony. Accordingly, Salpeter does not claim that the government's evidence was tainted; rather his claim is one of the "indirect", "prosecutorial" taint.

1. Prosecutorial Exposure To Information From the Compelled Salpeter Testimony.

Mr. Salpeter's first contention is that his prosecutors interviewed people who attended the compelled testimony and that the government has failed to show that they did not thereby receive information which aided them in some way in preparing and trying this case. Salpeter argues that his prosecutors' testimony that they did not knowingly seek or receive information originating from the compelled testimony does not meet this burden because they concededly did not know what information had been supplied by him in the bankruptcy proceeding and thus would not recognize tainted information when exposed to it.

The record discloses that two attorneys from the United States Attorney's Office in Delaware interviewed Mr. David McMillan, President of the Bank of Delaware, and Mr. Frank Uleau, one of Mr. Salpeter's executive employees during the period of the kite, each of whom attended portions of the compelled testimony.* The attorneys testified that they did not receive any information about the compelled testimony during these interviews and McMillan testified that he did not consciously relay to them anything he learned from that testimony. Uleau did not testify at the suppression hearing because of illness. The questioning by the attorneys did, however, cover subject matter also covered in the Salpeter bankruptcy testimony and special precautions were not taken, at least at the time of the Uleau interview, to focus attention on the importance of avoiding communication of information from the compelled testimony.** Considering

* Neither of these men was called as a trial witness.

** Mr. McMillan was instructed not to repeat information learned at the bankruptcy testimony and made a conscious effort not to do so. He did provide information, however, the likely source of which would have been the compelled testimony.

the record as a whole, I think it fair to say that the prosecutors may have been exposed to information which Uleau or McMillan learned from the compelled testimony. In my view this does not end the matter, however.

I accept as true, as does Mr. Salpeter, the testimony of the attorneys that they attempted to avoid, and thought that they had succeeded in avoiding, exposure to the compelled testimony. While Mr. Salpeter is correct in saying that this does not alone meet the government's burden, it is nevertheless important. If the prosecutors in this case did have informaton emanating from the compelled testimony they did not realize that the defendant was its source. This case is thus far different from the prosecutorial taint cases in which the prosecutor read a transcript of the compelled testimony and had the aid that necessarily comes from the equivalent of a pre-trial deposition of the defendant. In this case, the question whether the government was aided, directly or indirectly, by the compelled testimony arises in the context of a situation where any information obtained by the prosecutors was not known by them to have originated from a statement or admission of the defendant.

Mr. Salpeter did supply information in the course of the bankruptcy proceeding which would have been helpful to the government's case. He testified, for example, about the disposition of the funds realized from the kite and this was relevant to the issue of intent.* When one reviews the transcript of the bankruptcy testimony with the issues of this case in mind, however, it is apparent that there was no relevant information supplied by

* Salpeter's theory was that the bank intended him to have the money to help the cash flow of his nursing homes pending a proposed profitable sale of those homes. The compelled testimony indicated that some of the funds went to acquire improved real estate and a nursery business.

Salpeter during his compelled testimony which was not also known to Williams.** Williams had been controller of all of Mr. Salpeter's companies for years and was his confidante in business affairs. He had managed the kite on a day-to-day basis. Given the scope of Williams' knowledge regarding Salpeter's affairs, I fail to see how a prosecutor who had Williams' cooperation and who did not realize the source of any tainted information he may have possessed would have been in any better position than he would have been in if no bankruptcy had occurred.

In response to the argument that the compelled testimony was superfluous to the government's case because of Williams' knowledge and cooperation, Mr. Salpeter points out that the decision to offer Williams immunity in order to secure that knowledge and cooperation did not occur until after the compelled testimony. He suggests that this decision may have been made because the government learned of the complexity of defendant's kite scheme through the compelled testimony. I find this suggestion far fetched. The character of this case as far as complexity is concerned was apparent from the pre-bankruptcy investigation of the FBI, as was Williams' potential value as a witness. Moreover, in addition to the information obtained in that investigation from other employees about Williams' position and participation, Williams' attorney had, in the context of immunity negotiations, outlined the areas in which his client could help the government's case.* In sum, I am persuaded by the government that the decision to grant immunity to Williams was not a product of information secured through the compelled testimony.

** The broad scope and detail of Williams' knowledge is apparent from his testimony at the pre-trial taint hearings. Tr. Vol. A, pp. 108-32.

* Tr. Vol. C, pp. 144-45, Vol. D, pp. 9-12.

Mr. Salpeter also asserts that the government may somehow have been led to drop the Racketeer Influenced and Corrupt Organization (RICO) charges, 18 U.S.C. § 1961, *et seq.*, that were contained in its draft indictment, because he was compelled to disclose that certain of his properties were worthless and that the money from the kite had not been hidden or stashed outside the country. This contention is entirely unpersuasive.

First, Williams' cooperation was secured before the indictment was presented to the Grand Jury and, as I have already noted, Williams had a detailed knowledge of the financial condition of Salpeter's businesses as a result of the positions he held and his central role in the check kite. Thus, the government had an independent source for the information which defendant suggests may have had an influence on the charges made in the indictment.

Additionally, however, it is difficult to understand how Mr. Salpeter could have been prejudiced by the *withdrawal* of these criminal charges. He was convicted of mail fraud, the most obvious type of charge given the facts of this case. The fact that he was not prosecuted on a more serious and complex charge under RICO is simply beside the point, whatever may have been the reason for not pressing it.

2. *Prosecutorial Exposure To Documents Allegedly Produced In The Bankruptcy Proceedings.*

While much of the above analysis is equally applicable to Mr. Salpeter's argument relating to prosecutorial exposure to bankruptcy documents, the suppression hearing record is sufficiently different to warrant further comment. Mr. Salpeter refers to two sets of documents in the course of this argument: financial documents bearing bankruptcy exhibit stickers and check stubs and bank

statements pertaining to a personal account maintained by Mr. Salpeter with Bank of Delaware. Each of these sets concededly wound up in the possession of the government and each is said to demonstrate that there was prosecutorial exposure to documents obtained as a result of the compelled testimony. I will examine each set in turn.

During the course of Mr. Salpeter's bankruptcy testimony on November 16, 1978, the attorney for the Exchange National Bank of Tampa showed Mr. Salpeter a series of financial statements relating to various Salpeter controlled businesses. Each covered a period of time prior to December 31, 1976 and bore a stamp indicating receipt of the document by Exchange prior to the compelled testimony. After they were marked by the reporter, Mr. Salpeter identified these documents and testified that he probably had supplied them to Exchange though he had no specific recollection of having done so. Subsequently, the Grand Jury issued subpoenas for the credit files on Mr. Salpeter from each of the banks involved in his check kite. These were examined by the prosecutors for the purpose of determining what the banks knew about Salpeter's affairs. When these credit files were thereafter produced for inspection by the defense in this case, the Exchange credit file contained the above described financial statements with the exhibit stickers in place.

While the record in this case does not explain how documents with original bankruptcy exhibit stickers affixed wound up back in the credit file of Exchange, it does establish that Salpeter was not compelled to produce these documents in the bankruptcy proceeding, and that the government would have received them pursuant to the Grand Jury subpoenas even if there had been no compelled testimony. Finally, it might be added that, even

if these documents had been tainted, there has been no suggestion as to how they might have aided the government in the trial of this case.

Turning to the second set of allegedly tainted documents, it appears that Agent Graybill of the FBI's Baltimore office made an inventory of eight boxes of records in his custody in January and February of 1979. The inventory shows that all boxes except one contained checks, deposit slips, and bank statements for various Salpeter enterprises. In addition to these types of records presumably obtained by the banks, the Box 7 inventory reflects "check stubs, checks, and copies of bank statements" for a personal account which Salpeter maintained at the Bank of Delaware. Mr. Salpeter testified at the suppression hearing that, along with his bank records for a number of other personal accounts, the check stubs listed on the inventory had been produced for the inspection of the banks during his bankruptcy testimony on September 11, 1978. They remained in the banks' hands until November 16, 1978 and, according to Mr. Salpeter, this period of approximately two months was the only time these check stubs were out of his possession. He asks the Court to infer that some agent for the government made copies of the stubs during this period.

I decline to draw the suggested inference. All of the bank records of Mr. Salpeter's corporations, including those involved in the check kite scheme, were subject to being subpoenaed, and were subpoenaed, for analysis. The several personal accounts which produced the bank records presented by Salpeter for inspection by creditors on September 11, 1979 were not involved in that scheme and records for only one of those several personal accounts is reflected in the FBI inventory of records in its possession. I think it far more likely that the records of Mr. Salpeter's Bank of Delaware personal account were inadvertently

produced in response to the subpoena for the business bank records than that an agent for the government made a copy of the records relating to one insignificant personal account while Mr. Salpeter's personal records were in the hands of the banks between September 11 and November 16, 1978.

Even if the inference suggested by the defense were drawn, however, the result would not be altered. As already noted, Mr. Salpeter's personal Bank of Delaware account was not involved in the check kite scheme and I can perceive no way in which access to the check stubs for that account would have been of any benefit to the government. Mr. Salpeter tacitly acknowledges this. He argues, however, that the presence of this set of documents on the FBI's inventory establishes that the government had access to documents which he was compelled to produce in the bankruptcy proceeding and, accordingly, that the government had the burden of showing that there was an independent source for all the information reflected in those documents. As previously noted, I am not persuaded that the government in fact had access to the documents produced by Salpeter during the bankruptcy testimony, but, beyond this, I believe the defense misconceives the government's burden in a case of this kind.

The government has established that the attorneys who tried this case had no direct access to the compelled evidence in the bankruptcy proceedings and that there was an independent source for all evidence that went before the jury. The defendant's argument is that, nevertheless, some information may have filtered through to the prosecutors which may have affected some tactical decision during pre-trial or trial. He asserts that the government must show that every piece of information comprising the compelled evidence either played no role in any of the myriad of decisions made in the course of

the criminal proceeding or had an independent source. This would in most cases, be an impossible burden. It is clearly one that fairness to the defendant does not require the prosecution to shoulder. The defense in a situation of this kind is, of course, aware of the evidence which has been compelled and of the relevant trial issues. It is not unreasonable to require the defense to *identify* some part of that evidence and *articulate* some theory as to how it could conceivably have been of aid to the government before calling upon the government to *prove* that it had no access to that compelled evidence, that the information was valueless, or that it had an independent source.

In this case, the documents produced by Mr. Salpeter in the course of his bankruptcy testimony are in his possession. Yet he did not introduce any of them or suggest any way in which they might have assisted the prosecution. The reasonable inference from the general description of those documents in the bankruptcy testimony and the character of the issues litigated in this case is that they were simply irrelevant. In these circumstances, the Fifth Amendment does not require that a conviction be overturned because information contained in some unidentified document might have played a role in some unidentified tactical decision of the prosecution.

3. *Conclusion.*

Reduced to its essence, Mr. Salpeter's argument is that his conviction cannot stand because *Kastigar* bars prosecution whenever it is shown that the defendant was compelled to give testimony about the subject matter of a subsequent prosecution and that the government was in some was exposed to this testimony. This interpretation, however, is inconsistent with the Court's holding that the statutory immunity at issue in *Kastigar* passed

constitutional muster "by assuring that the compelled testimony can in no way lead to the infliction of criminal penalties." 406 U. S. at 461. The above quoted language indicates that the Court's central concern with immunized testimony is prejudice to the defendant, and not governmental exposure *per se*.

It is true that in most situations in which the government is exposed to compelled testimony it will not be possible to say with confidence that the prosecution received no aid. As the Eighth Circuit Court of Appeals observed in *United States v. McDaniel*, 482 F.2d 305, 311 (8th Cir. 1973), even if tainted evidence is not introduced at trial, compelled testimony may provide "assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea bargain, interpreting evidence, planning cross-examination and otherwise generally planning trial strategy." But these possibilities do not require the reversal of a conviction where a careful evaluation of the surrounding circumstances suggests no realistic possibility that the prosecution was aided, directly or indirectly, by the compelled testimony. *See United States v. Romano*, 583 F.2d 1 (1st Cir. 1978).

In this case, the nature of the crime was such that the investigation was focused on the defendant from the outset and evidence in the form of documents and employee-participants in the scheme was readily available. Virtually all of the investigation was conducted prior to the giving of the compelled testimony and one of the witnesses identified in that investigation had as much knowledge about the relevant events as did the defendant. Once the compelled testimony was given, the prosecutors made a conscious effort to avoid exposure to it and while I cannot find that they had indirect exposure to the information supplied by Mr. Salpeter during the compelled testimony, it is clear that they did not realize the source

of any information obtained through that exposure. Under these circumstances, I conclude that Mr. Salpeter's convictions are not the product of a violation of the Fifth Amendment and, accordingly, should not be overturned.

II. Post-Trial Motions

In addition to its suppression motion based on allegations of Fifth Amendment "taint", the defense has filed post-trial motions for a judgment of acquittal, or alternatively, for a new trial.* I find, however, that I lack jurisdiction to consider these motions as they have been filed outside of the time limits imposed by Federal Rule of Criminal Procedure 33. This Rule provides that,

> . . . A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

The facts relevant to this matter are as follows. Subsequent to the conclusion of trial, defense counsel filed a timely motion for an extension of time for submitting its post-trial motions. This request was granted, and the time was extended to April 25, 1980. On April 24th, counsel requested a further extension of time for the submission of these motions, and an extension was granted until June 11, 1980, the date on which the defendant's opening post-

* The defendant also filed a pre-trial motion seeking dismissal on the basis of selectivity of prosecution. The record provides no support for this contention and the motion is denied.

trial brief was due.* No additional motion or request for an extension was made, and defendant's post-trial motions and brief were not received by this Court until June 15, 1980.**

The meaning and effect of Rule 33 is plain and unambiguous. The Court of Appeals for this Court has held that the time limits imposed by this Rule are jurisdictional, and that any actions taken by a court outside of the authority provided are without effect. *United States v. Hamilton*, 457 F.2d 95, 99-100 (3d Cir. 1972); *United States v. Newman*, 456 F.2d 668, 672 (3d Cir. 1972). Thus, it would appear that this Court was without authority to extend the time for filing post-trial motions from April 25th to June 11th, as the June 11th deadline was not fixed during the 7-day period. This issue need not be resolved, however, for the defendant's post-trial motions did not even conform to this time limit, and I am clearly without jurisdiction to act on them.

I have nevertheless considered each of the grounds urged by Mr. Salpeter in support of his application and have concluded that none warrants the relief sought. Only one calls for further comment. Defendant complains that he was not supplied with an FBI report of an interview with one government trial witness, Mr. Hoggard, until after the trial.*** He suggests that if he had had this FBI

* The Order entered by this Court on April 25th reads:

The time for the defendant to file post-trial motions is deferred until the date on which his opening post-trial brief shall be due to be filed.

** None of defendant's motions were based on claims of newly discovered evidence.

*** The government tendered at trial the report of one interview with the witness but inadvertently did not disclose the report of a subsequent interview on October 9, 1979. The record does not disclose whether the second interview covered the same ground as the first.

report he would have been able to contradict the testimony of another government witness, Mr. Gray, who testified that he did not speak with defendant on the day the check kite came to light. The tardily delivered report suggests, however, that Hoggard had no personal knowledge of such a telephone conversation and thus could not have testified about it. Moreover, as far as the interview report itself is concerned, an out-of-court statement of one witness that is inconsistent with the in-court testimony of a second witness, cannot be used to impeach the latter's testimony. Thus, on the current record, there is no reason to believe a new trial would produce any evidence not produced at the first trial.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Criminal Action No. 79-88

UNITED STATES OF AMERICA,
Plaintiff,

v.

RICHARD D. SALPETER,
Defendant.

ORDER

THIS 5th day of November, 1980, for the reasons stated in the Court's Opinion of this date,

IT IS HEREBY ORDERED that the defendant's various motions to overturn his conviction, for a judgment of acquittal or for a new trial are denied.

/s/ WALTER K. STAPLETON
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
Nos. 80-2686 and 81-1265

UNITED STATES OF AMERICA

v.

SALPETER, RICHARD D.,
Appellant.

SUR PETITION FOR REHEARING

Present: ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges.*

The petition for rehearing filed by Richard P. Sapeter, appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By THE COURT,

/s/ A. LEON HIGGINBOTHAM
Circuit Judge

Dated: October 16, 1981

Chief Judge Seitz did not participate in the disposition of this petition for rehearing.

Partial List of Defendant's Compelled, Immunized Disclosures Which Were Conveyed to the Grand Jury by Mr. Uleau.

The following is a list of the topics covered first in the compelled testimony of the defendant, then later in the testimony of Mr. Uleau before the government and grand jury.

(1) At pages 24 through 26 of the March 9, 1978 transcript, the defendant testified about Major Land Properties. (Appendix, P. 416a-418a) At pages 8-9 of his Grand Jury testimony, Mr. Uleau testified about the same subject, Major Land Properties, Ltd. Appendix, P. 452a-453a)

(2) The defendant testified in detail about Major Land Trust and Major Land Properties Limited on March 9, 1978 at pages 16 through 25. (Appendix, P. 408a-417a) The Assistant United States Attorney drew information on these subjects from Mr. Uleau at Appendix, P. 454a.

(3) The defendant testified in detail about Tareyton Associates on March 9, 1978 at pages 42 through 44 pursuant to his grant of immunity. (Appendix, P. 424a-426a) Mr. Uleau discussed this subject with the Grand Jury as well. (Appendix, P. 454a)

(4) Immunized testimony on the subject of Connought Investment Corporation, Connought Properties, Ltd. and Connought Realty was rendered by the defendant on March 9, 1978 at pages 37 through 41. (Appendix, P. 419a-424a) Mr. Uleau too testified on these subjects. (Appendix, P. 454a-456a)

(5) The defendant testified under immunity and to some detail about Ridge Care, Inc. and Whitemarsh Con-

valescent Center on March 9, 1978 at pages 46 through 53. (Appendix, P. 428a-435a) Mr. Uleau too discussed these entities with the Assistant United States Attorney. (Appendix, P. 454a)

(6) On March 9, 1978, the defendant testified under immunity as to his salary, its amount and the methods by which he received payment at page 82. (Appendix, P. 436a and on January 25, 1978 at Appendix, P. 353a, 380a, 397a and 403a)

Mr. Uleau too imparted information on Mr. Salpeter's salary to the government and Grand Jury. (Appendix, P. 467a)

(7) At pages 6 through 46 of the January 25, 1978 session of compelled testimony by the defendant, he testified at length and in detail about Manhattan Convalescent Center. (Appendix, P. 324a-364a) Mr. Uleau was questioned on this subject at pages 6, 18, 19 of his grand jury testimony. (Appendix, P. 450a, 459a, 460a)

(8) At pages 48 through 65 of the January 25, 1978 session of the compelled testimony, the defendant testified at length and in detail about Golden Shores. (Appendix, P. 366a-383a). Mr. Uleau too responded to questions posed by Mr. McDonald about Golden Shores. (Appendix, P. 450a)

(9) At pages 385a to 391a of the Appendix the defendant testified at length and in detail about Newport Convalescent Center. Mr. Uleau too responded to questions posed by the government on this same subject. (Appendix, P. 451a)

(10) At pages 74 through 80 of the January 25, 1978 session of immunized testimony, the defendant testified at length and in detail about Riverside Convalescent Center.

(Appendix, P. 329a-398a) Mr. Uleau testified about the same subject at page 7 of his grand jury testimony before Mr. McDonald. (Appendix, P. 451a)

(11) At pages 81 through 87 of the January 25, 1978 sessions, the defendant testified at length and in detail on the subject of Hyde Park Convalescent Center. (Appendix, P. 399a-405a) Mr. McDonald drew information from Mr. Uleau on this subject as well. (Appendix, P. 450a, 465a, 466a)

(12) At various points throughout the course of the defendant's compelled testimony on both January 25, 1978 and March 8, 1978, he testified in detail about the workings of Major Care Corporation. Some examples can be found at pages 22, 26, 27, 41, 70, 78 of the January 25, 1978 session of his testimony. (Appendix, P. 340a, 344a, 345a, 359a, 388a, 396a) Mr. McDonald drew information from Mr. Uleau on this very same subject at various times, some examples of which can be found at various points on the following pages of the Appendix, P. 448a, 452a, 457a, 458a, 459a, 460a, 461a, 462a.

Opposition

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No. 81-1110

In the Supreme Court of the United States

OCTOBER TERM, 1981

RICHARD D. SALPETER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

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QUESTION PRESENTED

1. Whether the trial court correctly found that the government's evidence against petitioner was derived from legitimate sources wholly independent of his compelled testimony.

2. Whether the decision below conflicts with other federal court decisions regarding use of compelled testimony, or disregards procedural devices necessary to protect petitioner's Fifth Amendment rights.

3. Whether the trial court incorrectly shifted the burden of proof on the proper use of compelled testimony to petitioner.

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In the Supreme Court of the United States

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RICHARD D. SALPETER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. A1-A2) is not reported. The opinion of the district court (Pet. App. A3-A21) is reported at 502 F. Supp. 1071.

JURISDICTION

The judgment of the court of appeals was entered on September 22, 1981 (Pet. App. A2). A petition for rehearing was denied on October 16, 1981 (Pet. App. A23). The petition for a writ of certiorari was filed on December 14, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Delaware, petitioner was convicted on 17 counts of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to concurrent terms of five years' imprisonment

on each count, and was fined $17,000. The court of appeals affirmed (Pet. App. A1-A2).

1. Petitioner's conviction arose out of a check kiting scheme that resulted in the loss of more than two million dollars by banks in Florida, Pennsylvania, and Delaware (Pet. App. A4). Petitioner utilized the checking accounts of numerous companies controlled and operated by him in the scheme (*ibid.*), and managed the day-to-day operation of the check kite through his controller, Leroy Williams, and other subordinate employees (*id.* at A7).

The Federal Bureau of Investigation began a criminal investigation into petitioner's activities in both the Middle District of Florida and the District of Delaware as soon as the kiting scheme was discovered in late July 1977. During the fall of 1977, FBI agents examined relevant banking records and interviewed bank officials and employees of petitioner to chart the operation of the scheme (Pet. App. A4). The case was initially assigned to the United States Attorney for the Middle District of Florida, but in the early fall of 1978, after the bulk of the FBI investigation had been completed, the United States Attorney for the District of Delaware assumed primary responsibilities for the prosecution of petitioner (*id.* at A5). On November 6, 1979, a federal grand jury in Delaware returned an indictment charging petitioner with 17 counts of mail fraud (*id.* at A6).

2. While the criminal investigation into petitioner's activities was still pending in both the Middle District of Florida and in the District of Delaware, the banks that had suffered losses during the course of the check kiting scheme initiated involuntary bankruptcy proceedings against petitioner in the Middle District of Florida at Tampa. When called upon to testify in those proceedings, petitioner asserted his Fifth Amendment privilege against compelled self-incrimination, and he was granted use immunity under Section 7(a)(10) of the Bankruptcy Act, 11 U.S.C. 25(a)(10),

and 18 U.S.C. 6001 *et seq.* Petitioner testified on January 25, March 9, September 11, and November 15 and 16, 1978 (Pet. App. A5). The transcripts of the bankruptcy proceedings were sealed by order of the bankruptcy judge, and neither the Department of Justice nor the offices of the United States Attorney for the Middle District of Florida or the District of Delaware were involved in the proceedings in any way (*ibid.*).

3. Prior to commencement of petitioner's criminal trial, the district court conducted a hearing to determine whether the government had made any use of petitioner's compelled testimony in its investigation and prosecution of the case. Each witness ultimately called by the government at trial was produced for examination at the pretrial hearing. The trial court did not make any finding regarding the use of compelled testimony at that time, however, because defense counsel complained that he could not effectively cross-examine the witnesses without referring to petitioner's immunized testimony and thereby revealing its content to the prosecution. The district court therefore ruled that it would allow the defense to question witnesses further and produce additional evidence after trial in the event of a conviction (Pet. App. A6-A7).

At trial, petitioner's controller, Leroy Williams, testified under a grant of immunity. Williams explained in detail the inception and execution of the scheme, including petitioner's instructions during the check kite. He testified about the increasing size and complexity of the kite, and how it was ultimately computerized (Pet. App. A7). He also stated that he had supplied the government with a computer printout laying out the entire operation of the kite (*ibid.*). Other employees of petitioner's companies who had participated in the operation of the kite corroborated Williams' testimony (*ibid.*).

Petitioner testified in his own defense, admitting his role as the originator of the "check writing plan" but claiming that he had no intent to defraud the banks. He conceded that the 17 mailings of bank deposits, which formed the basis for the 17 mail fraud counts, had been a crucial part of the plan and that he had profited from the operation of the scheme. But he claimed that bank officials were aware of his "check writing plan" and had approved it as an extension of credit, although he admitted he had never expressly told any banker about the plan (Pet. App. A7-A8). Bank officials called by the government all denied any knowledge of the plan and testified that they had never intended to extend credit in this manner. Other evidence also showed that some of the banks had denied more routine extensions of credit to petitioner both before and during the kite (*ibid.*).

Following petitioner's conviction, a post-trial hearing was held to continue the questioning of witnesses on the issue whether petitioner's compelled testimony was used, directly or indirectly, against him (Pet. App. A6, A8). The district court, on the basis of the suppression hearing and trial evidence, concluded that the government had met its burden under *Kastigar* v. *United States*, 406 U.S. 441, 460 (1972), of demonstrating that its evidence came from a "legitimate source wholly independent of the compelled testimony" (Pet. App. A9).

ARGUMENT

1. Petitioner's claim that the government has failed to establish that it did not use directly or indirectly any information disclosed in his compelled testimony is clearly without substance. There can be "no question" (Pet. App. A9) but that the government has carried its burden of proving that all evidence used to convict petitioner was "derived from a legitimate source wholly independent of the compelled testimony." *Kastigar* v. *United States*, 406 U.S. 441, 460 (1972). As the district court noted (Pet. App. A9):

> The suppression hearing and trial evidence established beyond any doubt that each government witness to whom the jury was exposed was known to the government as a potential witness prior to the compelled testimony and testified on the basis of his or her personal knowledge of the check kiting scheme gained while it was in progress. Similarly, it has been shown that each document placed before the jury was a product of the government's investigation of the bank records and not of the compelled bankruptcy testimony.

This fact-bound conclusion of the district court, concurred in by the court of appeals, does not merit further review by this Court.

2. Recognizing the weakness of his factual argument under *Kastigar*, petitioner contends (Pet. 4-22) that, regardless of the prosecution's independent sources for the evidence used against him, his conviction must be reversed because the ruling below conflicts with decisions from other circuits and disregards procedures necessary to protect his Fifth Amendment rights. Both contentions are insubstantial.

The decision of the Third Circuit in this case does not conflict with the opinions of this or any other federal court. As discussed above, the prosecution met its heavy burden of showing an independent, untainted source for all evidence used in any way against petitioner. *Kastigar* v. *United States, supra*. And, far from conflicting with such opinions as *United States* v. *McDaniel*, 482 F. 2d 305, 311 (8th Cir. 1973), as petitioner claims (Pet. 8), the district court below agreed that even indirect use of compelled testimony is barred by *Kastigar* (Pet. App. A10-A11). Contrary to the situation in *McDaniel*, however, where the prosecution had read three volumes of compelled testimony, the prosecutors

in this case had no direct contact with petitioner's compelled testimony and had no reason to believe that any of their information "originated from a statement or admission of the [petitioner]" (Pet. App. A11).[1] The other cases cited by petitioner to support his claimed conflict are as inapposite as *United States* v. *McDaniel, supra.*[2]

Petitioner's claim (Pet. 10-22) that the government failed to provide adequate procedural safeguards to prevent the

---

[1]Even assuming, furthermore, that some information from petitioner's compelled testimony was inadvertently passed along to government prosecutors, "there was no relevant information supplied by [petitioner] during his compelled testimony which was not also known to Williams," the government's chief witness against petitioner (Pet. App. A11-A12). Thus, the district court properly rejected the contention that the government had failed to demonstrate that it had not been aided indirectly by petitioner's compelled testimony. "Given the scope of Williams' knowledge regarding [petitioner's] affairs, * * * a prosecutor who had Williams' cooperation" could not have been "in any better position than he would have been in if no bankruptcy had occurred" (*id.* at A12).

[2]*United States* v. *Hinton*, 543 F. 2d 1002 (2d Cir.), cert. denied, 429 U.S. 980 (1976), and *Goldberg* v. *United States*, 472 F. 2d 513 (2d Cir. 1973), involve actual use of a defendant's compelled testimony before a grand jury. In *Hinton*, the Second Circuit held that the same grand jury that heard a defendant's compelled testimony could not indict her, because it would be impossible for the grand jury not to "use" testimony it had actually heard. In *Goldberg*, however, the Second Circuit held that a defendant may be indicted by a grand jury other than the one that actually heard his compelled testimony, so long as the government meets its burden of showing that the indictment was based on evidence independent from the compelled testimony. Neither decision conflicts with the district court's opinion in this case. Petitioner's compelled testimony was not introduced before the grand jury that convicted him, and the government amply demonstrated legitimate and independent sources for all evidence used at all stages of this prosecution. Finally, *United States* v. *De Diego*, 511 F. 2d 818 (D.C. Cir. 1975), clearly does not support petitioner's contentions. In *De Diego*, the D.C. Circuit reversed the district court for failing to provide the government with an opportunity to prove that its evidence had been obtained from sources independent of a defendant's compelled testimony.

use of his compelled testimony is without merit. Although petitioner contends that the government should have taken greater steps to isolate his compelled testimony from government investigators by means of warnings to prospective witnesses, the fact remains that the district court and the court of appeals both concluded that the prosecution had met the "heavy burden" of showing that all evidence used in any way against petitioner "was derived from legitimate independent sources" (Pet. App. A9). Whatever the merit of petitioner's suggested prophylactic rules in other circumstances, they are clearly unnecessary when his Fifth Amendment privilege against compelled self-incrimination has been fully protected by the proscription of any direct or indirect use of his compelled testimony. Cf. *Kastigar* v. *United States, supra*, 406 U.S. at 453 ("immunity from use and derivative use [of compelled testimony] is coextensive with the scope of the privilege against self-incrimination").

3. Petitioner finally claims that the district court improperly shifted from the government to petitioner the burden of proof on the issue of the use of his compelled testimony. This contention is erroneous. The district court clearly held that "there is no question but that the government carried the *Kastigar* burden of showing that its evidence was derived from a 'legitimate, independent source' " (Pet. App. A9). In spite of this showing, however, the petitioner insisted that "some information may have filtered through to the prosecutors which may have affected some tactical decision during pre-trial or trial" (*id.* at A16). The quotation cited by petitioner (Pet. 23) as evidence that the court improperly shifted the burden of proof to petitioner on the *Kastigar* issue was merely the district court's reaction to petitioner's argument that his compelled testimony inevitably tainted his conviction. The clear import of the passage cited by petitioner is that the government's burden under *Kastigar* is satisfied after a detailed presentation of

the facts and circumstances demonstrates that the government has independent sources for all of the evidence used against petitioner at any stage of the prosecution. Petitioner cannot refute a thorough showing of independent sources with mere speculation that some unspecified information may have "filtered through" to prosecutors, thereby tainting and nullifying his prosecution.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

KATHLEEN A. FELTON
Attorney

FEBRUARY 1982

DOJ-1982-02

Petitioner's Reply Brief

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No. 81-1110

IN THE

Supreme Court of the United States

October Term, 1981

SALPETER, RICHARD D.,

Petitioner,

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONER'S REPLY TO BRIEF OF THE UNITED STATES IN OPPOSITION.

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PETITIONER'S REPLY TO ARGUMENT I

The first issue raised by the Petition is solely related to the Constitutional propriety of the government's use, before the grand jury, of the compelled, immunized disclosures of a target defendant. (Pet. 4) The government's Brief in Opposition employs considerable cleverness in clouding this issue. The government has presented quotations and record references which are entirely irrelevant to the consideration of this narrow issue. Further, the government's Opposition Brief mistakenly advises the Court that the Petitioner seeks an appeal of a "fact bound conclusion". (Brief in Opp. 5) Rather, the Petitioner appeals from a plain and narrow *legal* holding by the district court, which was affirmed by the appellate court:

> I have determined—I think it is already on the record. I'll repeat it. I have determined that we need not go into whether there was tainted evidence before the grand jury because I think it is a matter of law that the indictment would not be subject to being quashed on that ground. (R-33a)

In this regard, it is important to clarify a significant point on which the government seems to be confused. Directly contrary to that which is repeatedly implied by the government in its Brief in Opposition, (P. 4-8) the district court *specifically* found that the compelled, immunized disclosures of the Petitioner were *used* against the Petitioner before the grand jury which indicted him. (Pet. App. A10-A11) All of the government's citations to facts, record evidence, district court holdings and case law deal with the use by the government of the tainted data before the *trial* jury. These citations are misleading and confusing. This Petition is not directed to actions

before the trial jury. The sole issue raised by the Petitioner's first argument deals with the use of compelled immunized disclosures before the *grand* jury. Not once does the government mention this issue. Thus, it seems fair to suggest that if there existed case law precedent, statutory support or sound logic which favored the government's Opposition, the government would have provided such information to this Court in its Brief in Opposition. The government's Brief is void of even a sentence of case law or any other support for the government's opposition or the appellate court's holding on this issue.

Try as it might, the government cannot now change the plain language of the Second Circuit Court of Appeals in *Goldberg*,[1] *Kurzer*[2] and *Hinton*,[3] nor can it distort the straight forward wording of the District of Columbia Circuit in *DeDiego*.[4] The holding of the Third Circuit Court of Appeals in the matter presently before the Court creates a split in the Circuits, the government's didactic and remarkable pronouncements to the contrary notwithstanding.

1. *Goldberg v. United States*, 472 F. 2d 513 at 516 (2nd Cir. 1973). P. 7—Petition for Writ of Certiorari.

2. *United States v. Kurzer*, 534 F. 2d 511 at 516 (2nd Cir. 1976). P. 8—Petition for Writ of Certiorari.

3. *United States v. Hinton*, 543 F. 2d 1002 at 1009 (2nd Cir. 1976). PP. 6 and 7—Petition for Writ of Certiorari.

4. *United States v. DeDiego*, 511 F. 2d 818 at 821 (D. C. Cir. 1975). P. 8—Petition for Writ of Certiorari.

CONCLUSION

For the reasons expressed herein and in the Petition, it is requested that a writ of certiorari issue to permit review of the issues raised by the Petition.

Respectfully submitted,

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